

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own) Application No. NG-0035/PI-115
motion, seeking to investigate the interactions)
among aggregators, suppliers and jurisdictional)
utilities operating a customer choice program.)

RESPONSE OF KINDER MORGAN, INC.
TO ISSUES RAISED BY THE NEBRASKA PUBLIC SERVICE
COMMISSION IN ITS ORDER OPENING DOCKET

By its Order Opening Docket in the above-referenced docket, entered on May 2, 2006,
the Nebraska Public Service Commission ("Commission") requested comments on issues
pertaining to the participation of aggregators in Kinder Morgan's Nebraska Choice Gas Program.

The issues raised by the Commission are as follows:

- a. Whether the Commission should promulgate rules and regulations to address the relationship between aggregators and suppliers in a customer choice program. If so, what issues should be addressed?
- b. Whether a natural gas supplier can refuse to negotiate with a duly certificated and recognized aggregator on the grounds of the fitness to perform the service of an aggregator.
- c. Whether failure to honor a customer's choice to use an aggregator's services in a choice gas program constitutes a violation of the non-discrimination clause of the Code of Conduct contained in Kinder Morgan, Inc.'s September 8, 2004 Nebraska Gas Tariff Section 38.2E.
- d. Whether aggregated pools of customers should be offered bids when not represented by a certificated aggregator.

As detailed in the Commission's Order, the impetus for this docket relates to the apparently unsuccessful attempt by RnD Energy LLC (RnD) to provide aggregation services within the framework of Kinder Morgan's Nebraska Choice Gas Program for the 2006-2007 program year.

Before turning to the issues raised by the Commission, Kinder Morgan believes it will be helpful to provide some background regarding the Choice Gas Program as it operates in Nebraska, as well as the service that RnD has proposed to provide within the framework of that program, and Kinder Morgan's efforts over the last several months to facilitate RnD's participation in the program.

The Choice Gas Program

Kinder Morgan began offering the Choice Gas Program in Nebraska in 1998. The purpose of the program is to provide customers with a choice of commodity purchasing options offered by suppliers that meet the qualifications established in the program, and that execute the required forms, including the requirement regarding financial guarantees of performance. Customers are allowed to choose the best price offered by competing suppliers with respect to similar pricing options. Customers also are allowed to choose between price options that vary with respect to the amount of price risk that the customer is willing to accept.

In a given program year, customers are provided with a wide range of commodity pricing options. For instance, for the program year that commenced June 1, 2006, residential and commercial customers were allowed to choose between fixed prices, market indexed prices, market indexed prices with a cap, a pricing option that represents a blend of fixed and market indexed prices, and fixed bill price options. Agricultural customers in the Choice Gas Program had similar price options for the 2006 program year, with an added choice of a market-indexed price combined with the option to fix the price at any time. The ability of suppliers to offer these varied pricing options, while meeting the competition provided by the other suppliers, requires the suppliers to achieve a sometimes delicate balance whereby they are sufficiently compensated for any price and volume risk they are accepting under the pricing options they offer, while

keeping their price offerings competitive. Introducing an aggregator necessarily alters this equation.

Kinder Morgan has become aware recently of a limited number of instances where multiple customers have banded together (aggregated) in an effort to negotiate prices from one or more Choice Gas Program suppliers, and that suppliers generally have been willing to extend price offers to these customer groups. This proceeding, by contrast, addresses a proposal to introduce into the Choice Gas Program potentially large-scale customer aggregation by a firm that is not a supplier. Kinder Morgan has not had any experience to inform it as to the consequences that this event could have on customers, suppliers, or the Choice Gas Program. Over the long run, customers may receive a lower price, or they may receive a price that is higher because it includes an amount to compensate the aggregator.

It is key that the Commission not mandate the terms of dealings between suppliers and aggregators. Such an approach could have the unintended consequence of driving suppliers to (1) choose to withdraw from the program, or (2) reduce the number of pricing options offered due to a lack of pricing flexibility. Neither of these potential results is desirable.

RnD's Efforts to Market its Aggregation Services

Kinder Morgan first became aware of RnD's interest in providing aggregation services in Kinder Morgan's Wyoming service territory in early January 2006. Over the next approximately two months, Kinder Morgan worked with RnD, suppliers participating in the Wyoming Choice Gas Program, the Wyoming Public Service Commission and the Wyoming Office of Public Advocate, in an effort to develop agreements and tariff language to govern the operation of aggregators in the Choice Gas Program. The contemplated documents were based

on the existing, approved documents applicable to suppliers, with appropriate changes to reflect the difference in operations between aggregators and suppliers. By mid-March, which was approximately three weeks before the start of the Choice Gas Program balloting process in Wyoming and four weeks before the start of the balloting process in Nebraska, it had become clear that reaching consensus on the language of these documents was not going to occur in the near term. By the time that the balloting process began, RnD informed Kinder Morgan that it had obtained through its own means agency agreements with a number of customers in Wyoming and requested that Kinder Morgan provide volume data with respect to those customers. Kinder Morgan provided the requested volume data once RnD demonstrated that it in fact was acting with the authorization of the specified customers. Kinder Morgan's information is that RnD then solicited price bids from one or more Wyoming suppliers and successfully negotiated a transaction with one of these suppliers. .

The experience in Nebraska was slightly different. The State Natural Gas Regulation Act (Regulation Act) requires that firms wishing to perform aggregation services must receive certification from the Commission. This certification was granted by the Commission through its Order entered on February 28, 2006 in Application No. NG-0033. Kinder Morgan then proceeded to develop revisions to its Nebraska Gas Tariff to reflect the proposed operation of aggregators, including revisions to applicable portions of the Choice Gas Program Code of Conduct set forth in Section 38.2 of the Tariff's General Terms and Conditions. Kinder Morgan ultimately determined to defer filing any such tariff changes due to the fact that, in Kinder Morgan's view, RnD's marketing activities would be in immediate violation of the proposed Code of Conduct provisions. Kinder Morgan believed then, and continues to believe, that RnD should have to provide reasonable assurances that it will bring its conduct in compliance with the

applicable Code of Conduct provisions before the proposed Tariff changes would be filed with the Commission.

RnD again apparently was able to obtain agency agreements with a number of customers in Nebraska. Kinder Morgan's information is that RnD then solicited price bids from one or more Nebraska suppliers; in this instance, however, RnD apparently was unable to successfully negotiate a transaction with one of the suppliers. This leads us to another area of concern; namely, the marketing practices that RnD employed during the recent Choice Gas Program balloting process.

As indicated in a March 31, 2006 letter from Bud Becker, Esq., to Laura Demman, Esq., Director of Natural Gas for the Commission, Kinder Morgan raised what it deems to be serious issues regarding those practices. The pertinent part of that letter stated:

In my email to you dated March 26, 2006, I raised Kinder Morgan's concerns, as the administrator of the Choice Gas Program, regarding RnD's marketing activities. Five days later, RnD still has not modified its website to be in compliance with the code of conduct, despite the fact that it appears to modify the website on a daily basis. For instance, RnD's website as of this morning contains a statement to the effect that RnD can save clients the equivalent of a winter month's bill. Another statement suggests that RnD can obtain for its clients the rates available to large volume commercial and industrial customers. (The website on March 30, 2006 made this last statement appear to be a guarantee.) There is no factual basis to support RnD's claim that it could generate savings for any customer equivalent to a winter month's bill. Similarly, Kinder Morgan's experience causes it to question how any supplier could or would offer rates to small volume customers that are as low as those offered to large volume customers with high load factors. These are precisely the types of exaggerated marketing claims that are prohibited by the Commission-approved code of conduct because they tend to mislead less informed natural gas customers. Because RnD, the only aggregator currently approved as a Competitive Natural Gas Provider, already has evidenced an inability to comply with the code of conduct, Kinder Morgan believes that it is inappropriate to proceed with the tariff revisions until it has received adequate assurance that RnD will comply with all Tariff requirements.

In addition, Kinder Morgan has seen newspaper articles in which RnD personnel are quoted as disparaging the activities of suppliers participating in the Choice Gas Program, particularly ONEOK. Disparaging program suppliers naturally lessens the chances that a supplier participating in the Choice Gas Program will be interested in working with RnD. Moreover, Kinder Morgan is concerned about potential long-term damage these marketing practices could have on the long-term health of the Choice Gas Program. Kinder Morgan believes that neither it, its customers, nor the Choice Gas Program are served by the conduct that RnD has exhibited with respect to the Choice Gas Program and the suppliers participating in that program to date.

Relevant Statutory Provisions

The Regulation Act addresses customer choice programs in Section 66-1851. That section states:

- (1) Notwithstanding any other provisions in the State Natural Gas Regulation Act, a jurisdictional utility may file with the commission rates and one or more rate schedules and other charges, and rules and regulations pertaining thereto, that enable the utility to provide service to ratepayers under customer choice and other programs offered by a utility to unbundle one or more elements of the service provided by the utility.
- (2) The commission shall not eliminate or modify the terms of any customer choice or other unbundling programs in existence on the effective date of this act, or as thereafter modified by a filing made by the jurisdictional utility, except as permitted by the act after complaint or the commission's own motion and hearing. In any rate determination made under the act, the commission shall not penalize the utility for any action prudently taken or decision prudently made under its approved bundling program, by imputing revenue at maximum rates or otherwise.
- (3) The commission may not modify the provisions of a program under this section except upon complaint or the commission's own motion, wherein the commission finds, after hearing, that one or more aspects of the program are unduly preferential, unjustly discriminatory, or not just and reasonable.

This section addresses, *inter alia*, changes to the Choice Gas Program. Kinder Morgan is

interested in any changes that have the impact of improving the Choice Gas Program. Kinder Morgan intends to participate fully in this proceeding for the purpose not only of providing insight to the Commission with respect to the issues that it has raised, but also to gain insight regarding possible improvements to the Choice Gas Program.

Kinder Morgan now will address the four issues raised by the Commission following the order in which they appear in the Order Opening Docket.

Issue 1

The first issue raised by the Commission is as follows:

- a. Whether the Commission should promulgate rules and regulations to address the relationship between aggregators and suppliers in a customer choice program. If so, what issues should be addressed?

Kinder Morgan does not believe that the Commission should attempt to regulate the relationship between aggregators and suppliers through formal regulations. Regulations tend to be too rigid in that they often will not meet the exigencies of situations as they arise. Kinder Morgan favors the adoption of tariff provisions to address at least some aspects of that relationship. As already noted, it is imperative that the operations of aggregators be subject to a Code of Conduct. As envisioned by Kinder Morgan, that code would prohibit aggregators from disparaging the service provided by any of the suppliers participating in the Choice Gas program, and vice versa. The code already embodies this restriction as to conduct among suppliers. The code also would extend to aggregators the prohibition already applicable to suppliers applicable to the making of statements that are likely to mislead Kinder Morgan's customers with respect to the services provided by aggregators or the results that they are likely to achieve on the behalf of customers. The aggregator participation agreement should provide appropriate representations

and warranties concerning the business and operations of the aggregator, and should provide for the aggregator to indemnify Kinder Morgan, in its role of administrator of the Choice Gas Program, or a supplier in the event that the aggregator's conduct causes Kinder Morgan or the supplier to incur costs or liability.

Kinder Morgan has drafted the bulk of the provisions that it believes should be applicable to an aggregator operating on its system.

Issue 2

The second issue raised by the Commission is as follows:

- b. Whether a natural gas supplier can refuse to negotiate with a duly certificated and recognized aggregator on the grounds of the fitness to perform the service of an aggregator.

As this inquiry is directed towards Choice Gas Program suppliers, Kinder Morgan, in its role as administrator of the Choice Gas Program, generally will defer to the views of aggregators and suppliers on this issue. However, this appears to be a valid area of concern for suppliers.

Issue 3

The third issue raised by the Commission is as follows:

- c. Whether failure to honor a customer's choice to use an aggregator's services in a choice gas program constitutes a violation of the non-discrimination clause of the Code of Conduct contained in Kinder Morgan, Inc.'s September 8, 2004 Nebraska Gas Tariff Section 38.2E.

The referenced provision of the Supplier Code of Conduct states that a suppliers can not "unduly discriminate against similarly situated customers". In the first instance, an aggregator is not a "customer". A "customer" is an end user of natural gas under Kinder Morgan's tariff.

To the extent an aggregator believes it has been aggrieved by conduct of a supplier, this is an issue that must be resolved on a case-by-case basis under the specific facts extent in a

particular case. In Kinder Morgan's view, an issue in the nature of a complaint cannot be resolved in a proceeding that in essence is a generic investigation into an issue of interest to the Commission and intervening parties.

This issue presumably has been raised by the Commission due to the fact that RnD's attempts to negotiate a bid for its aggregated customer load for the 2006-2007 Choice Gas Program year were unsuccessful. Kinder Morgan expects that suppliers responding to the Commission's issues will provide some detail and argument as to why those negotiations were not successful. This information is likely to provide the Commission with further insight as to the factors that come into play when determining whether it is appropriate to respond to a solicitation for price quotes made by an aggregator.

Issue 4

The final issue raised by the Commission is as follows:

- d. Whether aggregated pools of customers should be offered bids when not represented by a certificated aggregator.

In Kinder Morgan's view, the resolution of this issue depends on the process that the Commission prefers to follow in such cases. Section 66-1849 clearly states that persons or firms performing aggregation services must be certificated by the Commission. The definition of "aggregator" contained in Section 66-1848 is broad enough to cover the scenario referenced in the issue as stated by the Commission. Aggregated pools of customers do not spring out of nowhere. They have to be aggregated by somebody.

The Commission has the authority to declare that persons performing aggregation services without certificate authority are acting illegally, and that suppliers cannot respond to solicitations for price bids. Alternatively, the Commission could direct suppliers to inform the

Commission of requests for price bids on aggregated load. The Commission could contact the aggregator, inform the aggregator of the need for certificate authority, and give the aggregator a specified period within which to obtain that authority. The Commission could follow up any failure to comply with a direction to suppliers that they must refuse prospectively to respond to solicitations for price bids from that aggregator.

CONCLUSION

Kinder Morgan appreciates the opportunity to comment and intends to participate in any additional informal or formal proceedings in this docket.

Dated this 2nd day of June, 2006.

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